UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
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DEC 3 1993

Dr. James M. Lents, Ph.D.
Executive Officer
South Coast Air Quality Management District
21865 East Copely Drive
Diamond Bar, California 91765-4182

RE: Comments On Draft Rule 201 Interpretation

Dear Dr. Lents:

Thank you for requesting our comments on your draft interpretation of Rule 201 dated November 2, 1993. As your letter and draft interpretation acknowledge, any interpretation of Rule 201 issued by the District must be consistent with the Clean Air Act and EPA's regulations. We have very serious concerns with the draft Rule 201 interpretation and believe that, if finalized, your interpretation will be contrary to federal law. Accordingly, we are requesting that your draft interpretation be revised to be consistent with the following discussion.

Rule 201 prohibits any person from beginning actual construction without obtaining a permit, and your draft Rule 201 interpretation is intended to provide more explicit guidance about the range of construction related activities that lawfully may occur prior to permit issuance. On November 4, 1993, we distributed a memorandum to all of the air agency directors in Region IX which reiterated the Environmental Protection Agency's ("EPA") longstanding policy precisely on this issue. That memorandum states:

> In contrast, all on-site activities of a permanent nature aimed at completing construction or modification of the source--including, but not limited to, installation of building supports and foundations, paving, laying of underground pipe work, construction of any permanent storage structure, and activities of a similar nature--are prohibited until the permit is issued and effective, under all circumstances.

Our policy is based on 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11) and 52.21(b)(11), which define "begin actual construction" for purposes of permit issuance. The definition includes such activities as installation of building supports and

foundations, laying of underground pipe work, and construction of permanent storage facilities within the scope of beginning actual construction. Longstanding federal requirements mandate that these activities are prohibited by law until an enforceable permit has been issued.

It is useful at this juncture to explain in greater detail the basis for EPA's policy. Rule 201 must meet the preconstruction review requirements of section 110(a)(2)(C) and Part D of Title I of the Act. The essential statutory purpose of these new source review requirements--to ensure that growth in emissions of air pollution from new or modified stationary sources is consistent with air quality planning goals--would be frustrated if an owner or operator could lawfully initiate the sort of construction related activities described above. This is so because these activities, by virtue of either their physical nature or their financial consequences represent a serious commitment to carry a construction project through to completion. Our experience has been that as a practical matter, "putting equity in the ground" in the manner described above can seriously compromise the ability of permitting authorities to issue a post-hoc permit that still fulfills the statutory purpose of new source review. Hence, we believe that the relevant provisions of the Clean Air Act and implementing rules and regulations--including Rule 201--must be interpreted as prohibiting a source owner or operator from undertaking these activities prior to receipt of a valid permit.

Your draft Rule 201 interpretation, however, is contrary to EPA's policy and 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11) and 52.21(b)(11). Specifically, subsection (b)(2) of your interpretation provides that a permit is not required for "laying of a foundation and utility or process lines included in the foundation." To comply with federal law, this subsection must be revised. In addition, subsection (a)(2) only requires permit issuance if the construction is an "integral part" of equipment that may emit or control air contaminants. We are concerned that this section may give readers a misimpression of the full reach of Rule 201, and so we strongly recommend that it too be revised. We believe that any construction related activities that are related to a project involving an emissions unit cannot begin until a valid permit is issued. In particular, we interpret the Clean Air Act, EPA regulations and Rule 201 as prohibiting any construction of either foundations, building supports or permanent structures that are related to an emission unit. If the emitting equipment cannot be used as intended unless a proper foundation is put in place, then laying the foundation is necessary to accommodate installation, fabrication, or construction of the equipment and its subsequent use.

Subsection (b)(3) is also impermissible under federal law when read in conjunction with subsection (a)(2). Although temporary on-site storage is allowed under appropriate circumstances, 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11) and

52.21(b)(11) prohibit any activities of a permanent nature. Your draft Rule 201 interpretation would allow on-site storage of emissions units at the proposed final location and construction of any structure that is not an integral part of the emissions unit. In combination, these subsections mean that a permit would not be required for constructing a building that is not an integral part of the emissions unit and placing the emissions unit within it. All construction activities short of hooking up or turning on the emissions unit could occur without obtaining a permit. This result violates the permitting requirements of the Clean Air Act and Rule 201 as approved into the applicable implementation plan. Subsection (b)(3) must also, therefore, be eliminated or revised to comply with federal law.

We appreciate receiving your memorandum from District Counsel analyzing the draft Rule 201 interpretation. However, the memorandum incorrectly analyzes relevant federal legal requirements. The memorandum erroneously concludes that the federal definition of "begin actual construction" is limited to determining creditable emissions reductions. The definition of "begin actual construction" in 40 C.F.R. §§ 51.165(a)(1)(xv), 51.166(b)(11) and 52.21(b)(11) fully applies to the legal obligation to complete preconstruction review and obtain a permit. The application of the definition to the permit requirement has also been emphasized in EPA Guidance memoranda dated December 18, 1978, March 28, 1986 and May 13, 1993, copies of which are attached. As these memoranda indicate, the definition of "begin actual construction" applies to the Clean Air Act's requirement to obtain a permit.

Your legal analysis also references and, in part relies on, an interpretation of Rule 201 that was issued in 1989. EPA was never consulted about the 1989 interpretation and never agreed that the 1989 interpretation comported with federal law. This point is significant because District Counsel's memorandum supports the draft 201 interpretation based on the fact that the District has historically allowed foundation work to take place without a permit to construct. Until very recently, EPA has not been aware of this practice and considers such unpermitted construction work to be a violation of federal law. EPA has initiated enforcement actions against sources that commence foundation work without a permit. Laying foundations that are necessary for installation, fabrication, construction or subsequent use of emissions generating equipment is a violation of law unless a permit has been issued.

The Rule 201 interpretation allows a person to construct building supports, lay foundations and store prefabricated equipment on-site in its final location prior to obtaining a permit. Under federal law, none of these activities may occur prior to issuance of an enforceable permit.

I want to thank you for your commitment to conform your interpretation of Rule 201 to federal requirements. However, as

our discussion above explains, several issues must be addressed to reach that goal. The most efficient way to reach that goal may be for the District to adopt our November 4, 1993 reiteration of EPA's policy as your interpretation of Rule 201. A copy of our memorandum is attached for your convenience. Please call either of us if you wish to discuss this matter further.

Sincerely,

David P. Howekamp
Director, Air & Toxics

Nancy J. Marvel
Regional Counsel

Enclosure

cc: Peter Greenwald, District Counsel